No. 14428.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH A. ELLIOTT,

Appellant-Libelant,

vs.

PACIFIC FAR EAST LINES, INC., a corporation, Claimant of S. S. "CANADA BEAR," etc.,

Appellee-Claimant.

APPELLEE-CLAIMANT'S REPLY BRIEF.

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APPELLEE-CLAIMANT'S REPLY BRIEF.

Statement of Pleadings and Facts.

On May 8, 1952, Appellant-libelant signed shipping articles at San Francisco, California, for a voyage to one or more ports in the far east and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months. [Claimant's Ex. "B."] Pursuant to these shipping articles, the master of the vessel, in consideration of Mr. Elliott's *specific* agreement to *conduct* himself in an *orderly, faithful,* honest *and sober* manner, agreed to pay him wages in the sum of $262.99 per *month.* This *monthly* wage rate was raised to $274.79 as of May 15, 1952. On June 18, 1952 the Appellant went ashore at Yokohama, Japan,

knowing that the vessel was scheduled to sail the next day. He went to a moving-picture show and about 10 P. M., June 18, 1952, he began to drink. Shortly before midnight he went from a drinking place into a taxicab to take him to where he could get a water taxi and did not know anything that happened after getting into the taxicab until he woke up the next morning in the hospital. [Tr. Vol. II, pp. 7-8, p. 45.] When Mr. Elliott woke up in the hospital he telephoned to a person designated by *him,* in his testimony at the trial, as the "agent for the Pacific Far East in Yokohama," and told him who he was and where he was and the "agent" told Mr. Elliott that he knew Mr. Elliott "was in there." [Tr. Vol. II, p. 8.] "The agent particularly asked me what I did want to do, and I asked him how about sending me some money when he gets a chance. He asked me how much. I told him $50.00." He said "I will bring it to you." He brought it to me approximately one week later and he told me "that he had been so busy, that is the reason he wasn't able to get over there any sooner." The $50.00 was in Japanese yen. Mr. Elliott signed a receipt for it. [Tr. Vol. II, pp. 9-10.] He received no other money while he was in Japan. [Tr. Vol. II, p. 10.]

Archibald Cook, the master of the vessel, was of the opinion on June 19, 1952, that Mr. Elliott had deserted the vessel at Yokohama, Japan. He demonstrated that conclusion by making an entry in the official log, as follows: "1600. June 19, 1952. Yokohama, Japan. Joseph Elliott, Wiper, deserted vessel at this port." [Claimant's Ex. "C."] According to the shipping articles [Claimant's Ex. "B"] the voyage ended at San Francisco, California, on June 29, 1952. These shipping articles demonstrate that as of June 29, 1952, the master of the vessel was still of the

opinion that Mr. Elliott had deserted the vessel. Line 37 of these shipping articles contains the entry that Joseph A. Elliott had deserted the vessel at Yokohama, Japan, on June 18, 1952. On *July 17,* 1952, some person other than Archibald Cook, the master of the vessel who had made the entry on the official log with reference to Mr. Elliott's desertion, made a notation on the official log, as follows: "Charge of desertion cancelled by Pac. Far East Lines as seaman was in hospital—see attached. R. A. F. 7/17/52." The entry on line 37 of the shipping articles (*supra*) was also altered by some person other than Archibald Cook and it is obvious that the alteration was made on or after July 17, 1952. The word "deserted" is circled and the words "Charge cancelled—see Log-Book" were hand-printed above the circled word "deserted."

On June 30, 1952, one day after the end of the voyage, Mr. Elliott "got out of the hospital." [Tr. Vol. II, p. 11.] Presumably, therefore, Mr. Elliott was in a hospital somewhere in Japan on June 29, 1952. The date when he left Japan does not appear anywhere in the record. What he did or where he was between June 30, 1952 and the date he left Japan does not appear in the record, but when he got out of the hospital on June 30, 1952, the "Canada Bear" was not in Yokohama. [Tr. Vol. II, p. 10.] He was repatriated back to the United States on the "China Bear" one of the ships of the Pacific Far East Lines (Appellee-claimant), arriving at Alameda, California, on July 25, 1952. [Tr. Vol. II, pp. 10-11.]

Predicated upon the foregoing facts with reference to what happened in Japan the Appellant contends, and the Appellee disputes, that he was *discharged* within the meaning of the word "discharged" as it is used in Section 4529,

Revised Statutes of the United States; Title 46, United States Code, Section 596, "at Yokohama, Japan." (App. Op. Br. p. 1, lines 22-24.)

What happened after Appellant got back to the United States on July 25, 1952 is as follows: I went to the office of the Pacific Far East Line in San Francisco on July 25, 1952. "I went to the port purser's office to get my voucher, moneys that I figured was due me, the balance of the amount that was earned during the particular voyage. Whoever the purser was, whoever the gentleman was at the window at the port purser's office, looked through the file of vouchers, and when he pulled mine out, he said, 'Mr. Elliott, this is a coincidence. You have $579 earnings and $579 deductions.'" [Tr. Vol. II, pp. 11-12.] While at the office of Pacific Far East Line in San Francisco I received no money on account of my wages. I later went to the office of the Shipping Commissioner in San Francisco and at that place I received no money on account of my wages. I signed off the articles on July 25, 1952, in the office of the United States Shipping Commissioner. [Tr. Vol. II, pp. 15-16.] At the time he signed off the shipping articles, the notation "no wages due" was on line 37. At the same time, July 25, 1952, Appellant signed a Certificate of Mutual Release addressed to Pacific Far East Line in which it was stated that there were "no wages due." [Claimant's Ex. "A"; Tr. Vol. II, pp. 36-38.]

Before going to the office of the United States Shipping Commissioner the Appellant contacted his Union.

> "Q. Mr. Elliott, didn't you, after leaving Pacific Far East Line on July 25, 1952, contact your union relative to this? A. Just a routine appeal.
>
> The Court: But you did talk about it?

The Witness: Yes, sir.

The Court: Did you tell the union representative about the $254.04?

The Witness: Yes, sir, and he was under the same conclusion I was, he figured the same, that I didn't have any coming to me any more than I thought . . ." [Tr. Vol. II, p. 44.]

"Q. Did you go back to the Pacific Far East Line office in San Francisco at any time within the four days after you were discharged on July 25, 1952, and make any demand for wages?

* * * * * * * *

The Witness: No." [Tr. Vol. II, pp. 45-46.]

"Q. Did you at any time later contact the Pacific Far East Line with reference to the wages? A. The only time Pacific Far East was contacted again was through you, I think, Mr. Fall." [Tr. Vol. II, p. 17.]

The contact referred to was a letter dated April 23, 1953 [Libellant's Ex. 1] written by Mr. Fall to Pacific Far East Line, Inc., 141 Battery Street, San Francisco 11, California. The letter, in part, reads as follows:

"It appears that Elliott was hospitalized in Yokohama, Japan about June 18, 1952. However, the Captain of the 'Canada Bear' did not leave his wages for him at that Port, nor has he ever been paid the same. He had drawn about $200.00 and has never received a statement of this item. Demand is hereby made upon you for the balance of his wages, *together with penalty wages of two days for one for each day after June 18, 1952.* You have failed to give him a statement of the overtime due to him, but have given him a form W-2, indicating his wages to be $579.24.

"I have been instructed to institute an action for the recovery of *wages and penalty* if a settlement cannot be made in the immediate future." (Emphasis added.)

Appellant's first amended libel *in rem* was filed on June 17, 1953. [Tr. Vol. I, pp. 2-8.] It is as follows:

"The libel of Joseph A. Elliott, late a seaman aboard the S. S. 'Canada Bear' in an action *in rem* against the S. S. 'Canada Bear,' for wages, civil and maritime, respectfully shows:

First: That at all times herein mentioned the S. S. 'Canada Bear' was and is an American Vessel, and will be during the pendency of process herein, within the jurisdiction of this Honorable Court.

Second: That the libelant is a seaman within the designation of persons permitted to sue herein without furnishing bond for, or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U. S. C. A.

Third: That on or about the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' not exceeding 12 calendar months, and back to the continental United States. That on said 8th day of May 1952, libelant entered into his duties as a member of said crew in the capacity of a Wiper, at wages or salary of $275.00 per month, which were increased to the sum of $286.00 per month.

Fourth: That on the 18th day of June, 1952, libelant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama,

and by reason thereof, libelant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel.

Fifth: That from the 8th day of May, to and including the 18th day of June, 1952, libelant earned as Wiper on the said S. S. 'Canada Bear,' the sum of $579.24. That libelant drew upon his wages during his employment, the approximate sum of $200.00, but libelant has not been rendered a statement of account, nor has he received any portion of the sum of $379.24, balance of wages earned by him from respondent upon to the date of May 18, 1952.

Sixth: All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

For a Second and Distinct Cause of Action Libelant Alleges:

Seventh: Libelant incorporates herein by reference Articles First, Second, Third, Fourth, Fifth, Sixth of his First Cause of Action as if fully set forth herein.

Eighth: That pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S. S. 'Canada Bear' on June 18, 1952. That none of libelant's wages were left at Yokohama, Japan.

Ninth: That demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952 for wages due libelant, but payment was refused.

Tenth: That on the 18th day of June, 1952, prior to the sailing of the S. S. 'Canada Bear' from Yokohama, Japan, libelant advised the agent of the S. S. 'Canada Bear' that libelant was in the hospital. That said agent advised libelant that he—the agent, would

notify the Master of the S. S. 'Canada Bear' as to the libelant's whereabouts, prior to the sailing of said vessel. That libelant is informed and believes, and therefore alleges, that the Master of the S. S. 'Canada Bear' was advised prior to his sailing that libelant was in the hospital. That notwithstanding the said knowledge upon the part of the Master of the S. S. 'Canada Bear,' the said Master refused, failed and neglected to pay to the libelant herein, or to leave with the agent of the S. S. 'Canada Bear' at Yokohama, Japan, or to leave with the United States Consul at Yokohama, Japan, the wages due libelant for his services on the S. S. 'Canada Bear.'" [Tr. Vol. I, pp. 2-5.]

On June 26, 1953, Appellee-claimant filed its answer to the first amended libel. In so far as it is pertinent to the appeal being prosecuted by the Appellant-libelant said answer reads as follows:

"I.

Admits the allegations in the First Article.

II.

Admits the allegations in the Second Article.

III.

Admits that on the 8th day of May, 1952, at San Francisco, California, the libelant signed regular Shipping Articles for a voyage on the S. S. 'Canada Bear' for a period not exceeding nine months and denies that said Articles provided for a voyage not exceeding twelve calendar months. Denies that on said 8th day of May, 1952, libelant entered into his duties at wages or salary of $275.00 per month or that said wages were increased to the sum of $286.00 per month and alleges that the wage rate provided in said Articles was at the rate of $262.99 per month

and that said wage rate was increased as of May 15, 1952, to the rate of $274.79 per month. . . .

IV.

Denies that on the 18th day of June, 1952, the libelant fell ill while the S. S. 'Canada Bear' was at Yokohama and claimant is informed and believes and upon said ground alleges that while the vessel was at Yokohama on June 18th and June 19th, 1952, the libelant wilfully and wrongfully consumed intoxicating liquor to such an extent that he was at 5:45 A. M. on June 19, 1952, so far under the influence of intoxicating liquor that he was picked up by Military Police and taken to the 8168th U. S. Army Hospital at Yokohama, Japan, and was hospitalized there with a diagnosis of chronic alcoholism and released therefrom on June 30, 1952. . . . Claimant denies that by reason of any illness the libelant was required to remain in any hospital until his vessel had sailed from Yokohama, or that by reason of any illness the libelant was repatriated to the United States direct from Yokohama, Japan, or did not rejoin his vessel by reason of any illness and alleges that the only reason for the libelant's failure to rejoin his vessel at Yokohama, Japan, was that the libelant voluntarily became intoxicated and was unable by reason of his intoxication to rejoin his vessel or to perform his contract.

V.

Denies that from the 8th day of May, to and including the 18th of June, 1952, the libelant earned as wiper, or otherwise, on the S. S. 'Canada Bear,' the sum of $579.24 and alleges in this respect that libelant was not, from the time he boarded said vessel up until June 18, 1952, at all times in a condition which would enable him to earn his wages and that the total

wages in accordance with the contract of employment which would have been due if the libelant had performed the said contract, was the sum of $576.50. Claimant further alleges that on or about the 25th day of July, 1952, the libelant executed a mutual release as required by Revised Statutes of the United States 4552 wherein he agreed that there were no wages whatever due him and said mutual release is on file at the office of the United States Shipping Commissioner at San Francisco, California, and claimant denies that there is due to the libelant the sum of $379.24, or any other sum whatsoever or at all.

VI.

Denies that all or singular the premises are or that any thereof is true excepting as hereinabove specifically admitted and admits that the premises are within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

VII.

Claimant incorporates herein by reference thereto its answer to the First, Second, Third, Fourth, Fifth and Sixth Articles of the first cause of action as if fully set forth herein.

VIII.

Denies that by reason of any statute, or otherwise, libelant became entitled to wages in any sum whatsoever or at all at the time he left the S. S. 'Canada Bear' on June 18, 1952. Admits that no wages were left at Yokohama, Japan, but denies that there was any duty or obligation to leave any wages at Yokohama, Japan.

IX.

Denies that any demand was made upon respondent on the 25th day of July, 1952, for any wages due libelant and denies that any wages were due

libelant and admits that no payment was made to libelant on said 25th day of July, 1952.

X.

Claimant has no information or belief upon the subject sufficient to enable it to answer the allegations in the Tenth Article and placing its denial thereof upon said ground, denies said allegations and each thereof." [Tr. Vol. I, pp. 9-13.]

In addition to the testimony and documentary evidence referred to hereinabove, the record shows as follows:

During the trial of the action it was stipulated that libelant signed on at $262.99 per month; that this monthly wage was increased to $274.79 as of May 15, 1952; that he actually earned wages in the sum of $513.50 between May 8, 1952 and June 18, 1952; that he was advanced the sum of $105.00; that he had "slops" of $16.86; that state unemployment benefits at 1 per cent ($5.77) were taken out; that social security benefits were in the sum of $8.65; and that withholding tax in the sum of $88.20 was taken out. [Tr. Vol. II, pp. 3-4.] At the start of the trial libelant's proctor stated that there was an issue as to the right of the claimant (cross-appellant) to deduct fines in the sum of $34.98, in that "the libelant claims there were no fines and the respondent claims that they were entitled to under federal statute, 46 U. S. C. 701." [Tr. Vol. II, pp. 4-5.] As the trial proceeded and libelant admitted that the amount of his log fines would probably amount to $34.98, his proctor agreed that the "$34.98 should be added to the other items

he (libelant) was charged with." [Tr. Vol. II, p. 14.] With this concession, made by libelant during the course of the trial, it was then agreed that subject to an existing mutual release signed by libelant at the office of the United States Shipping Commissioner on July 25, 1952, the balance of wages earned was $254.04. [Tr. Vol. II, pp. 25-28.]

The record is in a sloppy status with reference to the details of the amount of the expenditures or obligations which were incurred by the claimant over and above the total amount of the cash advances made to the libelant and the deductions which were conceded, *after the trial of the case commenced,* to be proper, but it was stipulated that the sum of $254.04 was deducted on account of hospital bills and other expenses "due to Mr. Elliott's misconduct." [Tr. Vol. II, p. 27 and pp. 29-30.] It was also stipulated by libelant's proctor that "it was possible, when this voyage was completed and before the seaman signed off, for the boat to have sued him for the amount of the hospital bill." [Tr. Vol. II, p. 39.]

At no time during the trial did the Appellant contend, excepting by an attempt to introduce a purported "Certificate of Discharge," that he had been discharged in Japan. To the contrary, he testified as follows:

> "Q. Is there any way you could get your discharge from that vessel without signing off? A. None that I know of." [Tr. Vol. II, p. 15.]
>
> "The Witness: . . . You have to go before the United States Shipping Commissioner to sign a

foreign voyage or a coastal voyage, and you have to go before the United States Shipping Commissioner to get your discharge." [Tr. Vol. II, p. 16.]

"The Court: At the end of the voyage the seaman signs off, if I understand it correctly, and if I haven't got it correctly, you can correct me, and when the seaman signs with a boat, the boat has some hold on that seaman until he is released; isn't that correct?

Mr. Fall: That is correct.

The Court: In other words, he cannot get a job with another boat until he gets a release from the boat he has signed with.

Mr. Fall: He is bound to that vessel.

The Court: The only way he can get unbound is to sign a release or sign off at the end of the voyage.

Mr. Fall: That's right.

The Court: So really and truly, now, the boat owner, can we put it this way, has a right to his services until the boat owner releases him to other employment?

Mr. Fall: Yes. He is bound to the vessel until he signs off." [Tr. Vol. II, p. 40.]

"The Court: You mean this certificate, then, was signed in San Francisco after the seaman had come back to the United States?

Mr. Fall: Yes. That was the only place he could possibly have obtained it other than from the United States Consul in Japan." [Tr. Vol. II, p. 76.]

The "certificate" mentioned immediately hereinabove by Judge Westover is a purported "Certificate of Discharge." [Libelant's Ex. 2 for Ident.] Appellant's proc-

tor tried to introduce the purported "Certificate of Discharge" because the Deputy United States Shipping Commissioner who prepared it inserted *his* conclusion that the Appellant had been discharged on June 18, 1952, at Yokohama, Japan. Appellee-claimant objected to the offer of the document in evidence on each of the following grounds, severally:

> "One, the figures and language '18 June 1952' following the printed words 'Date of Discharge' are and each thereof is a conclusion and opinion of whoever typed the figures and words on this piece of paper. Two, the document is not competent as proof of any fact in issue in this case. Three, there is no evidence proving or tending to prove that the master of the vessel had anything whatsoever to do with this so-called certificate of discharge, and the document on its face purports to have a typewritten signature, and there is no evidence proving or tending to prove that the master was even present or had anything whatsoever to do with the preparation of this certificate or any part of portion thereof." [Tr. Vol. II, p. 75.]

The objection was sustained. [Tr. Vol. II, p. 80.]

The Mutual Release which was executed by the libelant in the presence of a Deputy United States Shipping Commissioner at San Francisco, California on July 25, 1952, was in full force and effect from the time of its execution up to the time the trial judge set the same aside in the findings of fact, conclusions of law and final decree, signed, docketed and entered on April 12, 1954. In this respect, the record shows the following:

"The court finds that the release executed by the libelant was not made by him with a full understanding of his rights, and that there was no consideration whatsoever for the same." [Tr. Vol. I, p. 28, lines 7-10.]

"1. That the release executed by the parties is set aside for good cause shown; . . ." [Tr. Vol. I, p. 29, lines 10-11.]

Statement of the Case.

1. The basic question involved on this appeal is whether or not the Appellant-libelant has pleaded or proved a case entitling him to penalty-wages in accordance with the provisions of Section 4529, Revised Statutes of the United States.

2. Appellee-claimant contends that the sole and exclusive possible bases of a right of a seaman to collect penalty wages must be shown to exist within the provisions of Section 4529, Revised Statutes of the United States, and that the Appellant-libelant has neither pleaded nor proved facts bringing his claim for the penalty wages within the provisions of said Statute.

3. The Appellant-libelant totally disregarded, in his amended libel, the requirement that "the libel shall also propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit, so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article" (Gen. Adm. Rule 22).

The representation to the court that Section 596, Title 46, United States Code, reads as quoted by Appellant-libelant (Op. Br. pp. 10-11) is, to say the least, misleading. The vessel involved was one making a foreign voyage and therefore the portion of the Statute which is deemed necessary to the decision of the case and which should have been printed accurately, reads as follows:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; . . ." (Revised Statutes of the United States, Sec. 4529, as amended, 38 Stat. at L. 1164.)

Appellant-libelant has failed to print either at length or otherwise the provisions of Section 4530, Revised Stat-

utes of the United States, as amended and in effect in the months of June and July of 1952. This statute, reads as follows:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided* such a demand shall not be made before the expiration of, nor oftener than once in five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes; *Provided further,* That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such a release and take such action as justice shall require. . . ." (41 U. S. Stat. at L. 1006.)

ARGUMENT OF THE CASE.

POINT I.

Appellant-libelant Has Failed to Prove by Evidence, Oral or Documentary, That He Is Entitled to the Recovery of Penalty or Double Wages.

In the course of the voyage from San Francisco, California, to one or more ports in the Far East and back to a final Pacific Coast Port of discharge in the United States, for a term of time not exceeding nine calendar months [Shipping Articles, Claimant's Ex. "B"] the vessel "Canada Bear" arrived at the port of Yokohama, Japan, on June 17, 1952. (Statement of pleadings and facts, *supra.*)

There is no evidence whatever in the record with reference to the following elements:

1. That the vessel loaded or delivered cargo at Yokohama, Japan.
2. That while the vessel was at Yokohama, Japan, the Appellant-libelant demanded from the master of the vessel one-half part of the balance of his wages earned and remaining unpaid.
3. That there was any failure on the part of the master to comply with any such demand.
4. That he was discharged in a foreign port by a consular officer.

The statute with reference to the right of a seaman "to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo

before the voyage is ended" also provides as follows: "Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned." (Sec. 4530, Revised Statutes, 41 U. S. Stat. at L. 1006.)

There is no evidence whatever in the record which will support a finding that the Appellant-libelant was released from his contract or entitled to full payment of wages earned pursuant to the provisions, or any thereof, set forth in said Section 4530.

Section 4530, Revised Statutes, also indicates that even in cases where there has been a failure on the part of the master to comply with a demand for one-half part of the balance of wages earned and remaining unpaid at the time when such demand is made at a port where the vessel shall load or deliver cargo before the voyage is ended does not amount to a "discharge" even though the seaman is released "from *his* contract." Immediately after the sentence which provides for the release of the seaman from his contract by reason of a failure on the part of the master to comply with a demand for one-half part of the balance of wages the section proceeds as follows:

> "And when the voyage is *ended* every *such* seaman shall be entitled to the remainder of the wages which shall be then due him"

as provided in Section 4529, Revised Statutes.

It is important to notice the proposition that Section 4530, Revised Statutes, does not provide that a failure on the part of the master to comply with a demand made in accordance therewith shall release the master or the owner of the vessel from his or its contract as set forth in the Shipping Articles. Said Section 4530 does not

provide that the release of the seaman from his contract entitles the master of the vessel to discharge the seaman or acts, *ipso facto,* as a discharge of the seaman.

There are also other statutes of the United States which seem to be obviously pertinent to a logical determination of the manner in which an American seaman may be discharged from an American merchant vessel in a foreign port. These statutes are Sections 4573, 4574, 4576, 4580 and 4581, Revised Statutes of the United States.

Section 4573, Revised Statutes, reads as follows:

> "Before a clearance is granted to any vessel bound on a foreign voyage . . ., the master thereof shall deliver to the collector of the customs a list containing the names, places of birth and residences, and description of the persons who compose his ship's company; to which list the oath of the captain shall be annexed, that the list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them; and the collector shall deliver him a certified copy thereof."

Section 4574, Revised Statutes, provides, in part, as follows:

> "In all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew shall be examined by the collector for the district from which the vessel shall clear, and if approved by him, shall be certified accordingly. No person shall be admitted or employed on board of any such vessel unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear."

Section 4576, Revised Statutes, provides, in part, as follows:

> "The master of every vessel bound on a foreign voyage . . . shall exhibit the certified copy of the list of the crew to the first boarding officer at the first port in the United States at which he shall arrive on his return, and also produce the persons named therein to the boarding officer, whose duty it shall be to examine the men with such list and to report the same to the collector; . . . For each failure to produce any person on the certified copy of the list of the crew the master and owner shall be severally liable to a penalty of $400, . . .; but such penalty shall not be incurred on account of the master not producing to the first boarding officer any of the persons contained in the list who may have been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any such person dying or absconding or being forcibly impressed into other service of which satisfactory proof shall also be exhibited to the collector."

It thus appears, without the slightest question, that unless the master of the S. S. "Canada Bear" was able to show, in the absence of producing Joseph A. Elliott to the first boarding officer at the first port in the United States at which he arrived on his return from Yokohama, Japan, that Mr. Elliott had "been discharged in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal" at the time he produced to the collector the other persons composing the crew, or was able to exhibit satisfactory proof to the collector that Mr. Elliott had

died or absconded or had been forcibly impressed into other service, then the master and the owner of the vessel would have been subject to a penalty of $400.00.

If the only type of discharge of a seaman in a foreign country which will excuse the master of a vessel from the duty of producing Mr. Elliott to the first boarding officer at the first port in the United States at which the master arrived on his return was a discharge in a foreign country with the consent of the consul or vice consul there residing, certified in writing, under his hand and official seal, then it seems to follow that no seaman may be discharged in a foreign port excepting in accordance with the provisions of Sections 4580 and 4581, Revised Statutes.

Section 4580 is as follows:

> "Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge except as provided in this Act."

Section 4581 is, in part, as follows:

> "If any consular officer, when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman,

> he shall be accountable to the United States for the full amount thereof. The master shall provide any seaman so discharged with employment on a vessel agreed to by the seaman, or shall provide him with one month's extra wages, if it shall be shown to the satisfaction of the consul that such seaman was not discharged for neglect of duty, incompetency, or injury incurred on the vessel. If the seaman is discharged by voluntary consent before the consul, he shall be entitled to his wages up to the time of his discharge, but not for any further period. If the seaman is discharged on account of injury or illness, incapacitating him for service, the expenses of his maintenance and return to the United States shall be paid from the fund for the maintenance and transportation of destitute American seamen."

The foregoing statutes considered together clearly indicate that there is only one method by which a seaman may be discharged in a foreign port and that even the *mutual* consent of the master and the seaman is not sufficient to constitute a discharge. It is more obvious that neither the seaman nor the master can, by unilateral action, accomplish a discharge in a foreign port. Even where there is a voluntary consent by both of them it must be communicated to the consular officer and such discharge must be "before the consul."

Appellee-claimant contends that the true meaning of the words "the seaman has been *discharged,*" as they are used in Section 4529, Revised Statutes, cannot be ascertained without giving careful consideration and effect to the provisions of Sections 4573, 4574, 4576, 4580 and 4581 of the Revised Statutes, particularly when a seaman claims that he was discharged in a foreign port during the course of a voyage from San Francisco, California,

to one or more ports in the Far East and back to a final Pacific Coast port of discharge in the United States, for a term of time not exceeding nine calendar months.

Even if the provisions of said Section 4580 are considered by themselves it seems clear that no American seaman can be discharged excepting by the governmental officer referred to therein and only upon satisfactory proof that at least one of the disjunctive conditions therein set forth actually exists.

Appellee-claimant contends that the legal maxim *inclusio unius est exclusio alterius* is applicable.

> "As exceptions in a statute strengthen the force of the law in cases not excepted, so enumerations weaken it in cases not enumerated. Indeed, it is a general principle of interpretation that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius.* The rule applies even though there are no negative words excluding the things not mentioned. Thus, a statute that directs a thing to be done in a particular manner, or by certain persons or entities, ordinarily implies that it shall not be done in any other manner, or by other persons or entities . . ."
>
> 50 Am. Jur., pp. 238-240, Sec. 244.

At the time involved in an opinion of the Supreme Court, Section 2329 of the Revised Statutes, read, in part, as follows:

> " 'The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said Secretary and the recommenda-

tion of the Attorney General, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue . . . with his reasons therefor, with a statement of the amount of tax assessed, . . . and the amount actually paid in accordance with the terms of the compromise.' "

Although this section of the Revised Statutes has nothing whatever to do with the discharge of a seaman, what the Supreme Court said about its proper construction is quite important. Appellee-claimant contends that the rule of construction stated by the Supreme Court with reference to the particular statute involved is also applicable to a proper construction of the provisions of Section 4580, Revised Statutes.

"Sec. 3229 authorizes the Commissioner of Internal Revenue to compromise tax claims before suit, with the advice and consent of the Secretary of the Treasury, and requires that an opinion of the solicitor of internal revenue setting forth the compromise be filed in the Commissioner's office. Here the attempted settlement was made by subordinate officials in the Bureau of Internal Revenue. And although it may have been ratified by the Commissioner in making the additional assessment based thereon, it does not appear that it was assented to by the Secretary, or that the opinion of the solicitor was filed in the Commissioner's office.

"We think that Congress intended by the statute to prescribe the exclusive method by which tax cases could be compromised, requiring therefor the concurrence of the Commissioner and the Secretary, and prescribing the formality with which, as a matter of

> public concern, it should be attested in the files of the Commissioner's office; and did not intend to intrust the final settlement of such matters to the informal action of subordinate officials in the Bureau. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."
>
> *Botony Worsted Mills v. United States,* 278 U. S. 282, 288-289, 73 L. Ed. 379, 385.

The shipping articles provide, in effect, that Appellant-libelant was to be and remain a member of the crew from the port of San Francisco, California, to foreign ports and back to a port in the United States. These articles likewise obligated the master of the vessel to bring Mr. Elliott back to the United States unless he was lawfully discharged in a foreign port or died or absconded.

The provisions of the Revised Statutes, Sections 4573, 4574 and 4576, made it the statutory duty of the master of the vessel to bring Mr. Elliott back to the United States unless he had been "discharged in a foreign country *with the consent of the consul or vice consul there residing, certified in writing, under his hand and seal"* or he had died or absconded.

Section 4580, Revised Statutes, prohibits a consular officer from discharging a seaman in a foreign port unless it is made to appear by satisfactory evidence "that said seaman has completed his shipping agreement, or is entitled to his discharge under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States" and such officer cannot discharge a seaman unless he requires from the *master* of the vessel *"before* such discharge shall be made,

payment of the wages which may then be due said seaman; . . ."

There is no evidence whatever in the record indicating that the master of the "Canada Bear" made any application to a consular officer in Japan to discharge the Appellant-libelant or that the Appellant-libelant made any application to a consular officer for his own discharge. There is no evidence whatever in the record showing that any consular officer did discharge the Appellant-libelant.

Furthermore, neither the master nor Appellant-libelant *could* have made it appear to any consular officer that Appellant-libelant had completed his shipping agreement or was entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States.

Section 4596, Revised Statutes (30 Stat. at L. 760; 38 Stat. at L. 1166; 53 Stat. at L. 1147), reads, in part as follows:

> "Whenever any seaman who has been lawfully engaged . . . commits any of the following offenses, he shall be punished as follows:
>
> "First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.
>
> "Second. For neglecting or refusing without reasonable cause to join his vessel or to proceed to sea in his vessel, or for absence without leave at any time within twenty-four hours of the vessel's sailing from any port, either at the commencement or during the progress of the voyage, or for absence at any time without leave and without sufficient reason from his vessel and from his duty, not amounting to de-

sertion, by forfeiture from his wages of not more than two days' pay or sufficient to defray any expenses which shall have been properly incurred in hiring a substitute."

There is nothing in the second subdivision of said Section 4596, Revised Statutes, which provides that in the event a seaman commits any of the offenses set forth therein he would be entitled to a discharge upon application to a consular officer pursuant to Section 4580, Revised Statutes. Said second subdivision does not provide that the commission of the offenses therein set forth would entitle the master of the vessel to discharge the seaman in a foreign port.

It is held in a leading case that Sections 4529 and 4530, Revised Statutes, must be read and construed together.

> "Section 4529, so far as it affects this case, provides that the master or owner of any vessel shall pay to every seaman his full wages 'in case of vessels making foreign voyages, within 24 hours after the cargo has been discharged.' The Cubadist had made a foreign voyage and had discharged her cargo at Mobile, and the situation created by the Seamen's Act, if literally construed, had arisen. The appellants contend for a literal construction. The appellees contend that, construing the act in its entirety, it is evident that the words of section 4529, 'within 24 hours after the cargo has been discharged,' refer to a discharge of cargo upon the completion of the voyage for which the seaman shipped. This was the holding of the District Judge, and we concur in it.
>
> "Section 4529 and section 4530 should be construed together. The former provides for the payment of full wages to seamen; the latter, for half then earned

wages at any port, touched by the ship, where cargo is received or discharged. The former applies to full payment on completion of the voyage, or the termination of the shipping articles, or the discharge of the seaman; the latter to partial payments to be made during the progress of the voyage. Section 4530 provides for the payment of half then earned wages 'at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo *before the voyage is ended.*' During the progress of the voyage, full wages can only be demanded if half then earned wages are wrongfully denied. The section then reads as follows:

" 'And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, *as provided in section 4529 of the Revised Statutes.*'

"It is clear from this reference to section 4529 that Congress intended that section to cover only the payment of full wages due, on the completion of the voyage or discharge of the seaman, and section 4930 to cover all payments to be made during the progress of the voyage. The use of the words, in case of foreign voyages, 'after the cargo has been discharged,' instead of 'when the voyage is ended,' may be attributed to their former use in the Revised Statutes, when a necessity for retaining seamen, not only until completion of the voyage, but until after discharge of cargo, existed. However this may be, reading sections 4529 and 4530 together, they form a complete system only if we attribute to section 4529 the function of regulation of final payments in full upon completion of the voyage or discharge of the seaman, and to section 4530 the regulation of payments arising out of situations that occur during the progress of and before the time for final settlement between the

seaman and the shipowner, either because of the ending of the voyage for which he shipped or the discharge of the seaman, if that first occurred.

"To bring the two sections into harmonious relation with each other, it is necessary to give to the words 'after the cargo has been discharged' the meaning of a discharge upon the completion of the voyage for which the seaman shipped. There might be many complete discharges of cargo during the progress of a single voyage. In such cases, section 4530 and section 4529 would both apply, if section 4529 be given the construction contended for by appellants, and it would then come into direct conflict with section 4530. Section 4530 would entitle the seaman to only half of his wages then earned, while section 4529, if applicable to such a situation, would entitle him to full wages, even though he had not then been discharged. It will not be presumed that Congress intended to confer on seamen the right to demand, at their option, half-earned wages, or full wages, in identical situations. If section 4529 is limited to payments to be made upon completion of the voyage shipped for, and discharge of cargo thereupon, or to the discharge of the seaman, if that first occurs, there will be no such conflict between the two sections, and each will have its proper scope."

The Cubadist, 256 Fed. 203, 205-206.

A petition for a writ of certiorari filed in the Supreme Court by the seaman-libelant in *The Cubadist,* was denied on May 5, 1919. (249 U. S. 618, 63 L. Ed. 804.)

The shipping articles, Appellee-claimant's Exhibit "B" shows that all of the members of the crew who were aboard the "Canada Bear" and who had completed the agreement that they had made when they signed the

shipping articles were paid off, signed mutual releases, and were discharged in the presence of the master of the vesesl and a Deputy United States Shipping Commissioner in San Francisco, California, on June 29, 1952. The date, whether on June 29, 1952, or some date previous thereto, when the ship actually arrived at San Francisco, California, and the voyage thus ended, is not shown in the record.

Section 4549, Revised Statutes, provides, in part, as follows:

> "All seaman discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, . . . shall be discharged and receive their wages in the presence of a duly authorized shipping commissioner, . . . except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50."

If the Appellant-libelant was discharged within the meaning of Section 4529, Revised Statutes, at the time he signed off the articles in the office of the Coast Guard official acting as Deputy United States Shipping Commissioner in San Francisco, California, on July 25, 1952, it would have been an unlawful act, prohibited by Section 4549, Revised Statutes of the United States, for Appellee-claimant to have paid him any wages *before* such discharge. Pursuant to the provisions of Section 4549, Revised Statutes, Appellee-claimant could not have lawfully paid to the Appellant-libelant any wages which may have

been actually due at the time Appellant-libelant appeared at the port purser's office in San Francisco on July 25, 1952. This visit was prior to the time he went to the office of the United States Shipping Commissioner and signed off the articles. If he had not agreed in writing that he had no wages coming to him when he signed off the articles in the presence of a Deputy United States Shipping Commissioner then there might have been an obligation on the part of the Appellee-claimant to pay him whatever wages were actually due within four days after such discharge in accordance with the provisions of the Shipping Articles; and a compliance with the law, under such assumed but not existing facts, would have required the payment of such wages in the presence of a duly authorized Shipping Commissioner.

> "In its opinion before reargument the District Court, notwithstanding its conclusion that the master had sufficient cause for his failure to pay wages, ruled that the petitioner was entitled to recover double pay for the number of days which had intervened after the suit was brought. Petitioner argues here that, as there was no excuse for delay in payment after the suit was brought, the duty to pay double wages accrued from *that* date. But the liability is *conditioned* by the statute upon the refusal or neglect to pay wages *'in the manner hereinbefore mentioned, without sufficient cause.'* The quoted phrase refers to the *specified* periods *within which* the seaman's wages are directed to be paid, and the section thus imposes the liability for neglect, without sufficient cause, to pay the wages *within the prescribed period.* Petitioner seeks, by a more liberal interpretation of the words, to impose the liability for such delay in payment, without sufficient cause, as may occur at *any*

time *after an excusable failure to pay within the prescribed period.* This possibility is *precluded* by the further provision of the section that double wages shall be paid for each day 'during which payment is delayed beyond the respective periods' within which the payment is to be made. Thus, liability for double wages accrues, if at all, from the end of the period within which payment should have been made. *It must be determined by the happening of an event within the period,* failure to pay wages without sufficient cause. The statute affords a definite and a reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld. But it affords no basis for recovery if, by his own conduct, he precludes compliance with it by the master or owner. He cannot afterward impose the liability by the mere expedient of bringing suit upon it." (Emphasis added.)

McCrea v. United States, 294 U. S. 23, 31-32, 79 L. Ed. 735, 741.

In spite of the testimony given by Appellant-libelant at the trial which demonstrates that he did not entertain the slightest belief that he had been discharged at Yokohama, Japan, and the concessions made by his proctor in colloquy with the trial judge wherein it was admitted that the only way the Appellant-libelant could have gotten a discharge in Japan was through a consular-officer, he claims in his opening brief that he was actually discharged in Japan.

"Section 4511, Revised Statutes, and amendments (section 8300, Compiled Statutes), and the form provided in the schedule annexed, and section 4530,

Revised Statutes, and its amendments (section 8322, Compiled Statutes), for the protection of seamen, relate to the voyage, and impose duties on the ship and the seamen for the voyage. Neither can renounce these duties during the voyage. These statutes on their face, and the judicial construction given them, leaves no doubt of these conclusions: (1) The master *cannot* discharge the crew, and the crew *cannot* demand wages in full, until the end of the voyage; (2) the end of the voyage is not a port of distress, but the port of destination; (3) seamen are bound to serve until the voyage ends in the port of destination, unless there has been a breach of the contract by the master as to the time of the voyage or in some other material particular; . . ." (Emphasis added.)

Hamilton v. United States, 268 Fed. 15, 17, Cert. den., 254 U. S. 645, 65 L. Ed 454.

The record shows without conflict that the master of the vessel did not consider that the appellant-libelant had been discharged at Yokohama, Japan. The master's view of the situation, as it appeared to him, was that Mr. Elliott had deserted the vessel at that port and he made an entry in the official log book to that effect. This opinion of the master continued up to and including the end of the voyage and the discharge of the members of the crew who remained with the vessel to the end of the voyage. The charge that Mr. Elliott had deserted the vessel was clearly set forth on the shipping articles as of June 29, 1952.

"The statutes governing shipping articles for seamen date back to a common source, an Act of 1872. 17 Stat. 266. . . . The word 'discharge' appears in many sections of the source statute and the context of several of those sections compels the conclusion that 'discharge' means the termination of the contractual obligations of a given set of articles. It is provided, for instance, that seamen 'shall be discharged *and* receive their wages in the presence of a duly authorized Coast Guard official.' The master or owner who pays wages 'in any other manner' is subject to a fine. 46 U. S. C. A., §641 (emphasis added). The statute thus contemplates 'discharge' and payment of wages to be simultaneous acts and there is no doubt that seamen are paid when they are signed off the articles. 'Discharge' and 'signing off' must therefore be synonymous terms."

Newton v. Gulf Oil Corp., 180 F. 2d 491, 493.

In the light of the statutes and the case law on the subject, Appellee-claimant believes that Norris, in "The Law of Seamen," Volume I, Section 387, correctly states the basic principle as follows:

"Among the conditions of the statute (section 596) which makes the penalty operative is the requirement that a 'discharge' must take place either automatically by the termination of the voyage, by process of law, or by the action of the master."

In *"The Dawn,"* Fed. Case. No. 3,665, at page 202, the Court, in referring to a discharge of a seaman under the statutes in effect at the time, stated as follows:

"A discharge imports, in the natural and ordinary meaning of the word, a voluntary act on the part of the master."

The Appellant-libelant has completely failed to prove, by a preponderance of evidence or otherwise, the following essential elements:

1. That he had duly performed *his* obligations as specified in the Shipping Articles.

2. That when he left the vessel at Yokohama, Japan, he did so with the consent of the master.

3. That if he had the consent of the master to go ashore, the date and time when his shore leave expired.

4. That at the time the master made the log-entry that Mr. Elliott had deserted the vessel at Yokohama, Japan, the said master was not, in the light of circumstances actually known to him, reasonably justified in doing so.

5. That at the time of the end of the voyage on June 29, 1952, the master was not still reasonably justified in representing to the Coast Guard official acting as deputy United States Shipping Commissioner that Mr. Elliott had deserted the vessel at Yokohama, Japan, on June 18, 1952.

6. That he was discharged at Yokohama, Japan, on June 18, 1952 or June 19, 1952, or at any other specified time while he remained in Japan.

7. That the master of the vessel consented to or condoned Mr. Elliott's breach of his written contractual obligation to conduct himself in an "*orderly, faithful,* honest *and sober* manner . . . whether on board, in boats, *or on shore.*"

8. That any act or omission on the part of the master of the vessel released Mr. Elliott from his contract at Yokohama, Japan.

9. Whether or not cargo was actually discharged at San Francisco, California, upon the arrival of the vessel at that port.

10. That the neglect of the owner to pay him any wages within four days after he signed off the shipping articles containing his written concession that no wages were due and cooperated in causing the Certificate of Mutual Release stating the same thing to be delivered to the Appellee-claimant was a refusal or neglect, *within said four day period,* to pay wages *without sufficient cause.*

With reference to subdivision (9), immediately hereinabove, it is the contention of Appellee-claimant that a seaman claiming the penalties imposed by Section 4529, revised statutes, must prove whether cargo was or was not discharged at the end of the voyage and that if the evidence shows that cargo was actually discharged that there was a refusal or neglect, without sufficient cause, to pay any wages that might be due *within twenty-four hours* of such discharge of *cargo,* or that the *seaman* was discharged *before* the discharge of *cargo.* It is the event which *first* happens after the end of the voyage which fixes the time and period within which the earned wages must be paid. In view of the requirement of the law that seamen discharged in the United States must be discharged and paid in the presence of a Coast Guard officer, it is obvious that Mr. Elliott could not lawfully have been paid his wages in *Japan* within twenty-four hours after cargo had been discharged, if in fact cargo was discharged at the end of the voyage.

If what occurred at the office of the Coast Guard official, acting as a Deputy United States Shipping Com-

missioner, at San Francisco, California, on July 25, 1952, does not constitute a discharge of Appellant-libelant as of July 25, 1952 (by reason of the action of the Trial Court in setting aside the mutual release), then Mr. Elliott has not been discharged yet. In this connection, however, all Judge Westover did affirmatively was to set aside the *release* executed pursuant to the provisions of Section 4552, Revised Statutes of the United States.

As codified the law provides as follows:

> "That notwithstanding any release signed by any seamen under Section 644 of this title, any Court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require; . . ." (Title 46, U. S. Code, Sec. 597.)

Keeping in mind the rule stated in the case of *Newton v. Gulf Oil Corp.*, 180 F. 2d 491, 493, that " 'discharge' and 'signing off' must therefore be synonymous terms" it should follow that Elliott's act in signing off the articles on July 25, 1952, constituted a "discharge" within the meaning of Section 596, Title 46, U. S. Code. The mutual release was not void. It was, on the other hand, a binding contract until such time as some court of competent jurisdiction set it aside, for good cause shown. During this interval the appellee-claimant had sufficient cause to refuse or neglect to pay Mr. Elliott any sum whatever or at all on account of wages.

The Appellant-libelant makes the fallacious claim in one of his briefs that the law imposed upon the Appellee-claimant the burden of proving that the mutual release which he signed was valid, in accordance with the rule of law announced by the Supreme Court in *Garrett v.*

Moore-McCormack Co., 317 U. S. 238, 87 L. Ed. 239. The decision of the Court in that case is not applicable to the law or facts in the case at bar. The mutual release involved here is contained in a printed form and if the type is small that is no fault of Appellee-claimant. It was formulated, organized and printed by an agency of the United States. Appellant-libelant has been a seaman for many years and it would be strange indeed if he had never read the statutory form of mutual release contained in any of the shipping articles he had signed. The execution of such mutual release is required by law whenever a seaman is actually discharged, at least within the United States. It is quite obvious from the provisions of Section 4530, Revised Statutes of the United States (41 Stat. 1006) that the seaman is conclusively bound by the mutual release referred to therein unless *he* can convince some court of competent jurisdiction that there is good cause shown for setting it aside. The statute does not say that the release may be set aside unless the shipowner proves facts showing that it should not be set aside. The burden of proof is clearly placed, by the language of the statute, upon the seaman who claims that the release should be set aside.

Appellant-libelant has referred to Section 4550, Revised Statutes, 46 U. S. C. 642, quite a few times but is quite evident that his proctor has not carefully read the statute. Addressing certain observations to the *claim* that Appellant-libelant was discharged when the vessel sailed from Yokohama, Japan, at 1600 hours on June 19th it is quite obvious that it would have been utterly impossible for the master of the vessel to have delivered to Mr. Elliott "a full and true" or *any* "account of his wages, and all deductions to be made therefrom on any account whatso-

ever" at a time "not less than forty-eight hours before paying off or discharging" the seaman, for the simple reason that the master of the vessel could not have known forty-eight hours before the vessel sailed from Yokohama, Japan, that the Appellant-libelant would not be on board as a member of the crew at sailing time. The master had *actual* knowledge of the latter fact immediately before the vessel sailed because the seaman was then absent from the vessel. Furthermore, this section seems to strongly indicate that the master of a vessel has no authority whatever to discharge a seaman in any foreign port unless the master has, "not less than forty-eight hours before . . . discharging any seaman, deliver(ed) to him . . . a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; . . ." Compliance with this section seems to be a condition precedent to any actual discharge of the seaman by affirmative action on the part of the master of a vessel.

The "agent" of Appellee-claimant at Yokohama, Japan, did not refuse or neglect, without reasonable cause, to pay to Appellee-libelant whatever earned and unpaid wages might actually have been due in accordance with the terms and conditions of the Shipping Articles. If, as Appellant-libelant contends in his Opening Brief, the knowledge of the "agent" with reference to the fact that this seaman was in a hospital was imputed instantly to the principal, then the principal knew that the "agent" had asked the seaman what *he* wanted to do and the seaman replied that all he wanted, in effect, was a payment of $50.00 on account of any wages that might then have been actually due and that the seaman got every last cent that he had asked for. The principal also knew, under this theory of constructive notice, that when the "agent" brought the

$50.00 to the seaman about a week later it was accepted; that a receipt was signed for it; and no suggestion was made by the seaman that he wanted any more at that time.

The Shipping Articles, Appellee-claimant's Exhibit "B," is in the form *required by statute.* (Revised Statutes, Sec. 4511; 29 Stat. at L. 691; 32 Stat. at L. 829; and 37 Stat. at L. 736.) "The form given in the table marked A" in the schedule annexed to Section 4612, Revised States (30 Stat. at L. 762, 764; 38 Stat. at L. 1168; 46 U. S. Code, Sec. 713) provides, in part, as follows:

> "And the said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said master, or of any person who shall lawfully succeed him, and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore; and in consideration of which service, to be duly performed, the said master hereby agrees to pay the said crew, as wages, the sums against their names respectively expressed, and to supply them with provisions according to the annexed scale."

There is nothing in the Shipping Articles which were executed by the master of the vessel and the Appellant-libelant which provides that the latter was employed on a *daily* basis. He was employed on a *monthly* basis and the language of the contract clearly means that he was to be paid by the month and not otherwise. We will assume, for the sake of argument only, that he had duly performed his contract for the first month of the term of the employment consisting of a complete voyage to last not over nine months and that at the end of that first month he was entitled to wages for the full month. He

had not, however, duly performed his contract for the *second* month which began on June 8, 1952. In so far as the Shipping Articles are concerned there is nothing contained therein which provides that the master of the vessel with whom he was required by statute to make the contract agreed that any wage would be *earned or payable* excepting at the end of each month and this was conditioned upon the due performance of the seaman's written and statutorily required contract. During the second month from June 8, 1952, to and including July 7, 1952, the seaman would have earned, if he had duly performed his contract, the gross sum of $274.79. Therefore, if he had actually earned wages in the sum of $513.50 between May 8, 1952, and June 18, 1952, it was because of some contract or agreement outside of and collateral to the statutory shipping articles. He could not have earned the gross sum of $513.50 between May 8, 1952, and June 18, 1952, at the monthly wage rate as fixed by the Shipping Articles at the sum of $269.99 per month from May 8, 1952, to May 15, 1952, and thereafter at the monthly rate of $274.79.

Although it is not in the record, in all probability the difference between the Shipping Articles agreement as to the total wages agreed to be paid by the *master* and the amount opaquely stipulated to at the time of the trial can be accounted for on no premise excepting a collective bargaining agreement between the owner of the vessel and the union of which the Appellant-libelant was a member. It has not been held up to this time, so far as the

undersigned proctor is aware, in any case where such collateral agreement was *not* definitely included in the Shipping Articles by reference thereto or quoting therefrom, that a refusal or neglect to pay whatever amount may have been due *exclusively* by reason of the terms and conditions of such collateral agreement within four days after an actual discharge will subject the master or the owner to any penalty whatever.

It is respectfully contended that as the burden of proving every essential element of an actual right to recover the penalty sought by him rested upon the Appellant-libelant, he should have offered some affirmative evidence on this important subject.

It is respectfully submitted here that Sections 4511, 4512, 4521, 4523, 4527, 4529 and 4612 are in *pari materia* and must be construed together in order to ascertain what the Congress intended to include within the meaning of the word "wages" as used in Section 4529. It is also respectfully submitted that if this is done, the only reasonable conclusion to draw is that the Congress was legislating only with reference to the wages which are actually due in accordance with the statutory form of shipping articles. Certainly it cannot be contended that the *master of the vessel* was legally obligated to pay Mr. Elliott one cent which was not actually earned in accordance with the shipping articles. The statute seems to put the master and the owner in the same category in the event of a refusal or neglect, without reasonable cause, to pay wages in the manner required by said Section 4529, Revised Statutes.

> "When articles are signed by a crew for a voyage, all bargaining, individual or collective, is ended for the duration of the voyage. A contract is made, binding both owner and seaman, that is lawful, if the articles comply with the statutes, and should be lived up to scrupulously."
>
> *Rees v. United States,* 95 F. 2d 784, 792.

It is provided by statute that the shipping articles *shall* contain "Any stipulations in reference to advance and allotment of wages, or *other matters not contrary to law.*" (Title 46, U. S. Code, Sec. 564; R. S. Sec. 4511; emphasis added.) Therefore, to be binding upon the master, at least, any collateral agreement to pay wages in addition to those specifically set forth in the Shipping Articles must be set forth in the Shipping Articles.

It has not been decided up to date, to the knowledge of the undersigned proctor, that a shipowner is not entitled to offset against the total amount which might have been due (in addition to the wages agreed to be paid in accordance with the shipping articles) exclusively by reason of a collateral agreement not required by any act of the Congress, such amounts which the shipowner has been required to pay solely by reason of the admitted misconduct of the seaman. For example, if a shipowner enters into a collateral agreement with a seaman and agrees to pay him, in addition to the wages specified in any contract he may make with the master of the vessel, certain bonuses or extra wages in the event he behaves himself throughout the entire term of his employment, Section

4596 of the Revised Statutes (Title 46, U. S. Code, Sec. 701) would not be applicable. A deduction or offset under such circumstances would not be *punishment* for an *offense*. It would be a deduction or offset based exclusively upon the failure of the seaman to perform the conditions precedent to a lawful right to be paid any sum whatever on account of such bonuses or extra wages. These matters were not brought to the attention of the Honorable Harry Westover by the proctors who represented the parties at the trial. In any event they may be considered here on a trial *de novo,* because it is the province of this Honorable Court to render exact justice to the parties and there is no doubt about the proposition that it will do so.

It is therefore respectfully submitted that the Appellant-libelant has failed to prove facts sufficient to entitle him to collect any penalty whatsoever. The statute entitled Judge Westover, in the event he believed that there was good cause shown to set aside the mutual release to "take such action as justice shall require." This certainly authorized the Trial Judge to exercise a judicial discretion. In the exercise of that discretion the Trial Judge decided that the only action which justice required was the rendition of a judgment in the sum of $254.04, with interest at the rate of 7% per annum from June 20, 1952, and costs in the sum of $38.50.

POINT II.

The First Amended Libel Fails to State Facts Sufficient to Constitute a Cause of Action Pursuant to the Provisions of Section 596, Title 46, United States Code.

While the failure to allege facts sufficient to constitute a cause of action may not be available as a point on the *cross-appeal,* it is respectfully submitted that in its role as appellee, there is no impediment to raising this point as defensive matter.

The allegations of fact upon which Appellant-libelant relied in support of his suit are as follows:

> "FOURTH: That on the 18th day of June, 1952, libelant fell ill while the SS 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof, libelant was repatriated to the United States direct from Yokohama, Japan, and did not join his vessel.
>
> "FIFTH: That from the 8th day of May, to and including the 18th day of June, 1952, libelant earned as Wiper on the said S.S. 'Canada Bear,' the sum of $579.24. That libelant drew upon his wages during his employment, the approximate sum of $200.00, but libelant has not been rendered a statement of account, nor has he received any portion of the sum of $379.24, balance of wages earned by him from respondent upon (*sic*) to the date of May 18, 1952." [Tr. Vol. I, pp. 3-4.]
>
> "FOR A SECOND AND DISTINCT CAUSE OF ACTION LIBELANT ALLEGES:
>
> "SEVENTH: Libelant incorporates herein by reference Articles FIRST, SECOND, THIRD, FOURTH, FIFTH,

SIXTH of his First Cause of Action as if fully set forth herein.

"EIGHTH: That pursuant to Title 46, Section 596, U. S. Code, and Title 46, Section 597, U. S. Code, libelant became entitled to all of his wages at the time he left the S.S. 'CANADA BEAR' on June 18, 1952. That none of libelant's wages were left at Yokohama, Japan.

"NINTH: That demand was made upon respondent at San Francisco, California, on the 25th day of July, 1952, for wages due libelant, but payment was refused.

"TENTH: That on the 18th day of June, 1952, prior to the sailing of the S.S. 'CANADA BEAR' from Yokohama, Japan, libelant advised the agent of the S.S. 'CANADA BEAR' that libelant was in the hospital. That said agent advised libelant that he—the agent, would notify the Master of the S.S. 'CANADA BEAR' as to the libelant's whereabouts, prior to the sailing of said vessel. That libelant is informed and believes, and therefore alleges, that the Master of the S.S. 'CANADA BEAR' was advised prior to his sailing that libelant was in the hospital. That notwithstanding the said knowledge upon the part of the Master of the S.S. 'CANADA BEAR,' the said Master refused, failed and neglected to pay to the libelant herein, or to leave with the agent of the S.S. 'CANADA BEAR' at Yokohama, Japan, or to leave with the United States Consul at Yokohama, Japan, the wages due libelant for his services on the S.S. 'CANADA BEAR.'" [Tr. Vol. I, pp. 4-5.]

The first sentence in the Eighth Article is a conclusion of law and does not constitute an allegation of any facts.

By reference thereto, Appellee-claimant incorporates herein all of its argument under Point I, pages 13-19 of

its opening brief as Cross-appellant, already served and filed.

In addition to what is said on this subject in the "Opening Brief of Cross-Appellant" there are other reasons why the first amended libel fails to state facts sufficient to constiute a cause of action pursuant to the provisions of Section 4529, Revised Statutes.

If, as is alleged, the libelant "fell ill" during the course of the voyage and for that reason alone was unable to rejoin his vessel or complete his obligations set forth in the shipping articles, he would have been entitled to an *indivisable* sum of money consisting of the wages he had actually earned up until the time he suffered some illness, in the service of the vessel, plus his unearned wages from the date of the illness up to and including the end of the voyage. This total and indivisible sum could not possibly have been calculated until the actual end of the voyage because the amount of the unearned wages could not have been known until that time.

With reference to statutory rights and remedies, in the case of *Patterson v. Sears-Roebuck & Co.,* 196 F. 2d 947 at 949, the Court states the rule as follows:

> "Those claiming the benefit of them must bring themselves within them. They cannot extend or enlarge them beyond the statute's terms."

With reference to the provisions of Section 4529 of the Revised Statutes, Title 46, U. S. Code, Section 496, the Honorable Learned Hand stated that "the section is penal, and the right *stricti juris.*" (*Petterson v. United States,* 274 Fed. 1000, 1001.)

With reference to the same statute, the United States Court of Appeals, Second Circuit, in the case of *McCrea v. United States,* 70 F. 2d 632, at pages 634-635, states as follows:

> "The statute here involved calls for the payment of double wages, while the Arkansas statute was only for pay at the same rate. The penalty element is just twice as pronounced in this statute. It may well be that such a statute has the dual purpose of compensation and punishment behind it. But, in deciding whether the United States has agreed to be liable for double the pay of a seaman whenever one of its agents violates this statute, we believe the *dominant purpose* of the statute must control and that such purpose is *punishment* for the violation." (Emphasis added.)

Sections 4529 and 4530, Revised Statutes of the United States, (Secs. 596 and 597, Title 46, U. S. Code) are in *pari materia* in so far as the case at bar is concerned and must, therefore, be considered together.

There is nothing whatever within the four corners of these two sections of the Revised Statutes which states that when a vessel sails from a foreign port under the *facts* alleged in the first amended libel that the seaman who has been left behind is within four days thereafter, entitled to the full payment of all wages earned.

The case of *Yoffe v. Calmar Steamship Corporation,* 23 Fed. Supp. 629, 1938 A. M. C. 890, is relied upon by Appellant-libelant in support of his contention that "if on the 19th day of June, 1952, the Master of the 'Canada Bear' sailed the vessel from the port of Yokohama, Japan, leaving libelant behind, and with knowledge that libelant was at the time in the hospital, libelant was discharged

from the service of said ship at the time of its sailing and the entire wages of the libelant become due at that time." (App. Op. Br. p. 29.)

In the *Yoffe* case "The libelant fell ill in the service of the vessel without his fault and was thereby forced to leave the ship on January 20, 1938, at the port of San Francisco, California, where he entered the United States Marine Hospital." His "wages were paid to and including January 20, 1938." Yoffe had signed articles for an inter-coastal voyage from Baltimore, Maryland, to Pacific Coast ports and return.

At the time involved in the *Yoffe* case, Section 4549, Revised Statutes of the United States, Section 641, Title 46, United States Code, provided, in part, as follows:

> "All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of 75 tons or upwards, *from a port on the Atlantic to a port on the Pacific, or vice versa,* shall be discharged and receive their wages in the presence of a duly authorized Shipping Commissioner . . ., except in cases where some competent court otherwise directs; and any master or any owner of any such vessel who discharges any such seamen belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than $50.00." (Emphasis added.)

It is extremely unlikely that the vessel involved in the *Yoffe* case, the same being a steamship, was of the burden of less than 75 tons. Judge Roche's opinion in the *Yoffe* case makes no reference to Section 4549, Revised Statutes of the United States, and it was probably over-

looked or perhaps it was actually complied with and, for that reason, nothing was said about it in the memorandum opinion.

In the course of his opinion, Judge Roche stated as follows:

> "The circumstances under which the libelant left the vessel, on account of illness, and the payment of wages to the date of his leaving, sufficiently establish that the libelant was discharged from the vessel on January 20, 1938, within the meaning of Section 4529, Revised Statutes."

It is clear from what is actually said in Judge Roche's opinion in the *Yoffe* case that the master of the vessel and the seaman involved mutually and freely agreed that the seaman was to be discharged on January 20, 1938, when he entered the United States Marine Hospital and also mutually and freely agreed at said time that a certain specific sum of money was due him as earned wages and that said agreed sum was paid by the master to the seaman at said time. The cited case is not applicable to the type of situation set forth in the first amended libel in the case at bar. One good and sufficient reason is that no American seaman may be discharged in a foreign country without the consent and approval of the United States Consul at such port.

In the case of *Soumalainen v. Helsingfors Steamship Company,* 1942 A. M. C. 1486, Judge Clancy, United States District Court, Southern District of New York, after setting forth the facts that "on March 13, 1941, libelant was injured on the vessel; was thereafter hospitalized at the Seaman's Hospital . . ." makes the bald statement that "the sailing of the vessel without the

libellant was equivalent to his discharge." The learned Judge cited no authority in support of this conclusion and made no attempt to analyze the provisions of Section 4529, Revised Statutes of the United States, in justification thereof. In any event the decision has nothing whatever to do with what constitutes a discharge of an American seaman in a foreign port during the course of a voyage from a port in the United States to foreign ports and return.

This Honorable Court has decided that the mere fact that a seaman engaged on a foreign voyage becomes ill, goes to a hospital and that the vessel continues on the voyage, leaving him on shore at the hospital, does not constitute a discharge. In the case referred to the seaman was left at Honolulu but that geographical location of what happened would not change the rule in this Circuit that such facts in and of themselves do not amount to a discharge. (*Pacific Mail S. S. Co. v. Lucas,* 264 Fed. 938.)

In the case of *Halvorsen v. United States, et al.,* 284 Fed. 285, the libelant was employed as first engineer on the steamship Higho at the port of Baltimore, February 16, 1921, for a voyage to South America and other ports and back to the home port for a period not exceeding 12 months. On the 28th of May following, at the port of Rio de Janeiro, without his fault, he became ill and was placed in a hospital, where he remained until June 21st following. After discharge by the hospital, he being without funds and being informed that his wages had been left with United States consul, he called upon the consul, who refused to pay any sum unless the libelant accepted the whole sum left by the master as payment in full for the voyage.

It is obvious, from the facts stated by District Judge Neterer, that the ship sailed from Rio de Janeiro with knowledge on the part of the master thereof that the libelant was then in a hospital. Judge Neterer held as follows:

> "The relation disclosed between the libelant, the United States consul, and the ship at the time of the payment of wages at Rio de Janeiro to the date of entrance to the hospital was not that of a discharged seaman.
>
> * * * * * * * *
>
> "The status of the seaman, the discharge contended for, the libelant's arrival at the home port, I think, disclose sufficient cause to challenge the right to double pay under section 4529, R. S. (Comp. St. §8320). This statute is designed for the protection of seamen, to prevent abuses and subjecting a seaman to expense while waiting for settlement. The circumstances in this case do not call for such an allowance."
>
> *Halvorsen v. United States, et al.,* 284 Fed. 285, 287.

Appellant-libelant fails to allege any facts showing that he had completed his shipping agreement or was entitled to his discharge in Japan under any Act of Congress or according to the general principles or usages of maritime law as recognized in the United States.

There is also a complete failure to allege facts showing that any refusal or neglect of the master or owner to pay the earned wages was an *arbitrary* refusal or neglect.

> "But the increased payment for waiting time is not denominated wages by the statute, and the direction that it shall be recovered as wages does not purport to affect the condition prerequisite to its accrual that

refusal or neglect to pay shall be without sufficient cause. The phrase 'without sufficient cause' must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages (H. R. Rep. 1657, Committee on the Merchant Marine and Fisheries, 55th Cong. 2d Sess.) and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.

"The words 'refuses or neglects to make payment . . . without sufficient cause' connote either conduct which is in some sense arbitrary or willful, or at least a failure not attributable to impossibility of payment. We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, [56] but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible."

Collie v. Fergusson, 281 U. S. 52, 55-56, 74 L. Ed. 696, 698.

It is, therefore, respectfully submitted that the second cause of action, first amended libel, does not state facts sufficient to constitute a cause of action pursuant to the provisions of Section 4529, Revised Statutes of the United States, Section 596, Title 46, United States Code; and that this point may be asserted on appeal because of the established rule that an appeal in a case of admiralty and maritime jurisdiction constitutes a trial *de novo*.

Conclusion.

In the libel it is alleged that "libelant fell ill while the said S. S. 'Canada Bear' was at Yokohama, Japan, and was taken to a hospital for treatment, and was required to remain in said hospital until his vessel had sailed from Yokohama, and by reason thereof . . . did not join his vessel." [Tr. Vol. I, p. 3.] Appellant-libelant did not attempt to prove any of these allegations. In his Opening Brief, page 7, he concedes that "there is no evidence to show why the libelant was hospitalized or how he got there." Appellee-claimant agrees *in toto* with this admission of Appellant-libelant.

There is no reason to discuss Appellant-libelant's argument with reference to the subject of imputed knowledge excepting to call attention to the following matters: 1. The knowledge of the "agent" was not imputed to master of the vessel. 2. The knowledge of the "agent" that Appellant-libelant was in a hospital on June 19, 1952 and was in the same hospital about a week later when the sum of $50.00 was given to him may or may not have been imputed to Appellee-claimant. This would depend upon affirmative proof (not speculation or surmise) that this knowledge was acquired within the scope of the agency. There is no proof that it was within the scope of the "agent's" duties to ascertain where the Appellant-libelant was or why he was where he might have been. There is no proof that it was within the scope of the "agent's" actual duties to pay to Appellant-libelant any sum whatever. If the "agent" volunteered to pay the $50.00 with the

hope that he would be reimbursed, knowledge of the act of payment would not be imputed to the Appellee-claimant.

If, which is vigorously disputed, the Appellant-libelant was discharged by the *master* when the vessel sailed without him at 1600 hours on June 19, 1952, it was obviously impossible for the *master* to have personally paid Appellant-libelant any wages in United States currency or gold (Sec. 4548, Rev. Stat.), or at all, within four days after the time of sailing because the master was obviously at sea and the seaman was in Japan during this entire period. There is no statute or case law known to the undersigned proctor which required the master of the vessel to delay the sailing of the vessel in order to go to the hospital where the seaman was confined even if he had possessed actual knowledge of the fact that he was there. It is the master of the vessel who is the agent of the shipowner charged with the duty of discharging and paying off seamen in foreign ports. There is no evidence in the record which would support a finding that the said master refused or neglected, without sufficient cause, to pay any wages within four days after the exact minute that the seaman became "absent without leave" or wtihin four days after he failed to return to the vessel before its scheduled and actual sailing time.

It does not seem right that the Appellant-libelant is entitled to complain about the alleged failure of the trial judge to make findings with reference to any particular element. The record shows that *his* proctor prepared the

findings of fact and submitted them to the trial judge for signature; that the proposed findings were not approved either as to form or substance by any proctor for the Appellee-claimant; and that the *findings* as *proposed* were signed without any alteration by the trial judge.

It is respectfully contended that the Appellant-libelant is not entitled to any relief at the hands of this Honorable Court.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellee-Claimant.